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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Megan Sweeney,

10 Plaintiff,

11 v.

12 Marnie A Kulbeth,

13 Defendant.
14

No. CV-24-01647-PHX-DMF

ORDER

15 **I. INTRODUCTION**

16 This matter is before the Court on United States of America's ("United States" or
17 the "Government") Motion to Dismiss (Doc. 19), which Defendant Marnie Kulbeth
18 ("Defendant" or "Defendant Kulbeth") joined (Doc. 21). Plaintiff Megan Sweeney
19 ("Plaintiff" or "Plaintiff Sweeney") responded (Doc. 23). The United States and Defendant
20 Kulbeth replied (Docs. 24, 25). The motion to dismiss is fully briefed, and the matter is in
21 full consent to proceed before a United States Magistrate Judge (Docs. 9, 16, 17). The
22 Court has carefully reviewed the record in this matter, including all the parties' briefing
23 regarding the pending motion to dismiss, and the matter is ripe for the Court to rule.

24 **II. PROCEDURAL AND LEGAL POSTURE**

25 This action regards an amended order of protection entered by the Maricopa County
26 Superior Court (or "Superior Court") in case number FN2024-050866 on May 31, 2024,
27 against Defendant Kulbeth (Doc. 1-4 at 8-9). Plaintiff Sweeney and Defendant Kulbeth
28 are co-workers at the Phoenix VA Medical Center ("Phoenix VAMC") (Doc. 1 at 1-2; Doc.

1-4 at 6-7). The May 31, 2024, amended order of protection includes orders enjoining Defendant Kulbeth (1) from having contact with Plaintiff Sweeney at the Phoenix VAMC except through attorneys, legal process, and court hearings, and (2) from entering the Phoenix VAMC if Plaintiff is present (Doc. 1-4 at 8-9). Defendant Kulbeth requested a hearing in the Maricopa County Superior Court regarding the amended order of protection due to Defendant Kulbeth and Plaintiff Sweeney sharing an employment site at the Phoenix VAMC; the Superior Court set a hearing (Doc. 1-10 at 3-6).

On July 3, 2024, before the set hearing in the Superior Court, the United States removed the action to this Court pursuant to 28 U.S.C. § 1442(a)(1), which provides removal of an action to federal court if the defendant is an “officer (or any person acting under that officer) of the United States” and the action “relat[es] to any act under color of such office,”¹ and pursuant to 28 U.S.C. § 1446, which governs procedure for removal of civil actions to federal court (Doc. 1).

In the Notice of Removal, the United States asserted that, “[r]emoval is appropriate where the Defendant’s conduct arose within the scope of federal duties and there is an allegation of a colorable federal defense. *Mesa v. California*, 489 U.S. 121, 129 (1989)” (*Id.* at 3). The United States, through the United States Attorney’s Office for the District of Arizona, further averred in its Notice of Removal to this Court that:

[t]o the extent Plaintiff seeks an order enjoining the VA from scheduling Plaintiff and Defendant to work at the Phoenix VA Medical Center at the same time and/or retraining [*sic*] Defendant from entering the federal workplace while Plaintiff is present, the United States asserts the defense of sovereign immunity. The United States, absent its consent, enjoys sovereign immunity from suit in state courts. *Minnesota v. United States*, 305 U.S. 382,

¹ The primary “purpose of this removal statute is to protect the lawful activities of the federal government from undue state interference[,]” and § 1442(a) “serves to overcome the ‘well-pleaded complaint’ rule that would otherwise preclude removal even if a federal defense is asserted.” *Weis v. DSM Copolymer, Inc.*, 160 F. Supp. 3d 954, 962 (M.D. La. 2016) (citing *Mesa v. California*, 489 U.S. 121, 126, 136 (1989)); *see also Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) (explaining that the “right of removal is absolute for conduct performed under color of federal office, and ... the policy favoring removal ‘should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)’” (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969))).

387 (1939); *Kansas v. United States*, 204 U.S. 331, 342 (1907). Sovereign immunity shields the United States and its officers from suit unless an express congressional waiver of that immunity applies. *See Fed. Bureau of Investigation v. Super. Ct. of Cal.*, 507 F. Supp. 2d 1082, 1094 (N.D. Cal. 2007); *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Army & Airforce Exch. Serv. v. Sheehan*, 456 U.S. 728, 734 (1982). An action seeking a judgment that would “interfere with the public administration” or “restrain the Government from acting” constitutes a suit against the United States. *State of Washington v. Udall*, 417 F.2d 1310, 1315 (9th Cir. 1969) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). “An action against a government employee constitutes a suit against the United States assuming it would have one of these effects.” *Fed. Bureau of Investigation*, 507 F. Supp. 2d at 1094 (citing *Udall*, 417 F.2d at 1313-14); *see also Hendy v. Bello*, 555 F. App’x 224, 226 (4th Cir. 2014) (“[O]fficers acting within their authority generally . . . receive sovereign immunity” because an action against a government official in his official capacity is actually a “suit against the official’s office.”).

(*Id.*). The United States reported that insofar as the amended order of protection enjoins Defendant Kulbeth’s actions and movements at work by, inter alia, ordering Defendant Kulbeth not to go to the Phoenix VAMC when Plaintiff Sweeney is present and to not have any contact or communication with Plaintiff Sweeney while at work, the amended order of protection restricts the daily operations of the Phoenix VAMC (*Id.* at 3-4).

The pending motion to dismiss (Doc. 19) filed by Movant United States and joined by Defendant Kulbeth (Doc. 21):

seeks dismissal of the amended order of protection insofar as it restrains Defendant [Kulbeth]’s presence and actions at the Phoenix VAMC because the United States has not waived its sovereign immunity for claims to enjoin federal employees in the federal workplace and because the amended order of protection is barred by the derivative jurisdiction doctrine. *See In re Elko Cty. Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997) (“The jurisdiction of the federal court on removal is, in a limited sense, derivative jurisdiction. In short, if the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none.”).

(Doc. 19 at 1-2). Upon this Court dismissing or dissolving the amended order of protection to the extent it enjoins or restricts Defendant Kulbeth’s presence, conduct, and communications at the Phoenix VAMC, the United States also requests that the “remainder

1 of the action, which relates to non-workplace conduct, should be remanded to the Superior
 2 Court” (*Id.* at 9). Defendant Kulbeth’s joinder in the motion also requests that the
 3 remainder of the matter, not relating to restraint of Defendant Kulbeth’s conduct and
 4 presence at the Phoenix VAMC, be remanded back to the Superior Court (Doc. 21; *see*
 5 *also* Doc. 25). In response to the United States and Defendant Kulbeth,² Plaintiff asks the
 6 Court to “compel the United States to waive its sovereign immunity” in this case (Doc. 23).

7 The motion to dismiss is fully briefed (Docs. 19, 21, 23, 24, 25), and this matter is
 8 in full consent to proceed before a United States Magistrate Judge (Docs. 9, 16, 17).

9 **II. RULINGS**

10 After careful review of the record, including the parties’ arguments regarding the
 11 motion to dismiss, the Court finds the removal to this Court was proper, will grant the
 12 motion to dismiss, will vacate the Maricopa County Superior Court’s amended order of
 13 protection as set forth herein (regarding provisions that restrict communications, conduct,
 14 and presence of Defendant Kulbeth at the Phoenix VAMC and regarding provisions that
 15 restrict the daily operations of the Phoenix VAMC), and will remand the remainder of the
 16 amended order of protection (regarding provisions that restrict conduct, communications,
 17 and presence of Defendant Kulbeth in places other than the Phoenix VAMC and that do
 18 not restrict the daily operations of the Phoenix VAMC) to the Maricopa County Superior
 19 Court.

20 **A. Summary of Applicable Law**

21 Federal courts are courts of limited jurisdiction with no “inherent” subject matter
 22 jurisdiction; they can adjudicate only those cases that the Constitution and Congress
 23 empower them to adjudicate. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377
 24 (1994); *see also* Fed. R. Civ. P. 12(h)(3) (“If the Court determines at any time that it lacks
 25 subject-matter jurisdiction, the court must dismiss the action.”). Federal Rule of Civil
 26 Procedure 12(b)(1) allows a defendant to raise the defense, by motion, that the court lacks
 27 jurisdiction over the subject matter of an entire action or of specific claims alleged in the

28 ² The Court appropriately warned Plaintiff regarding the requirements to respond to the
 motion to dismiss and joinder thereto (Docs. 20, 22).

1 action. *See* Fed. R. Civ. P. 12(b)(1).

2 Once jurisdiction is challenged, the party asserting subject matter jurisdiction has
 3 the burden of establishing subject matter jurisdiction. *See Emrich v. Touch Ross & Co.*,
 4 846 F.2d 1190, 1195 (9th Cir. 1988). To establish jurisdiction over claims brought against
 5 the United States and its employees, the plaintiff must demonstrate both “statutory
 6 authority granting subject matter jurisdiction” over the claims and “a waiver of sovereign
 7 immunity.” *E.J. Friedman Co. v. United States*, 6 F.3d 1355, 1357 (9th Cir. 1993) (citation
 8 omitted). The United States is immune from suit except when it consents to be sued.
 9 *United States v. Dalm*, 494 U.S. 596, 608 (1990). Any waiver of sovereign immunity must
 10 be “unequivocally expressed in the statutory text[,] . . . strictly construed in favor of the
 11 United States, and not enlarged beyond what the language of the statute requires.” *United*
 12 *States v. Idaho ex rel. Dir., Idaho Dep’t of Water Res.*, 508 U.S. 1, 6-7 (1993) (internal
 13 citations and quotations omitted). Unless the plaintiff “satisfies the burden of establishing
 14 that [the] action falls within an unequivocally expressed waiver of sovereign immunity by
 15 Congress, it must be dismissed.” *Dunn & Black, P.S. v. United States*, 492 F.3d 1084,
 16 1088 (9th Cir. 2007). In other words, sovereign immunity acts as a jurisdictional bar;
 17 absent an unequivocal statutory waiver of sovereign immunity, courts lack jurisdiction to
 18 entertain a suit against the United States. *See United States v. Sherwood*, 312 U.S. 584,
 19 586-88 (1941).

20 Sovereign immunity shields from suit not just the United States, but also United
 21 States officers, unless an express congressional waiver of that immunity applies. *Fed.*
 22 *Bureau of Investigation*, 507 F. Supp. 2d at 1094 (citing *Block*, 461 U.S. at 287; *Army*, 456
 23 U.S. at 734). An action seeking an order that would “interfere with the public
 24 administration” or “restrain the Government from acting” constitutes a suit against the
 25 United States. *See Udall*, 417 F.2d at 1315 (quoting *Dugan*, 372 U.S. at 620). “An action
 26 against a government employee constitutes a suit against the United States assuming it
 27 would have one of these effects.” *Fed. Bureau of Investigation*, 507 F. Supp. 2d at 1094
 28 (citing *Udall*, 417 F.2d at 1313–14); *see also Hendy*, 555 F. App’x at 226 (“[O]fficers

1 acting within their authority generally . . . receive sovereign immunity” because an action
 2 against a government official in his official capacity is actually a ““suit against the official’s
 3 office.”” (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989)).

4 In addition, “the Supremacy Clause was designed to ensure that states do not ‘retard,
 5 impede, burden, or in any manner control’ the execution of federal law.” *Denson v. United*
 6 *States*, 574 F.3d 1318, 1345 (11th Cir. 2009) (quoting *McCulloch v. Maryland*, 17 U.S. (4
 7 Wheat.) 316, 436 (1819); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).
 8 An “officer of the United States cannot be held in violation of state law while
 9 simultaneously executing his duties as prescribed by federal law.” *Denson*, 574 F.3d at
 10 1347 (11th Cir. 2009) (citing *Johnson v. Maryland*, 254 U.S. 51, 56–57 (1920)). “[T]he
 11 obligations imposed by federal law are supreme, and where any supposed right or claim
 12 under state law would impede an officer from performing his duties, it must relent.” *Id.*
 13 Thus, the Supremacy Clause precludes state courts from enforcing orders that interfere
 14 with the performance of federal officers. *Id.* at 1345–46.

15 **B. Discussion**

16 As a threshold matter, the Government properly removed this action under 28
 17 U.S.C. § 1442(a)(1), and no timely motion to remand has been filed.³ The removal to this
 18 Court and the motion before the Court relate to directives by a state court, the Maricopa
 19 County Superior Court, in the May 31, 2024, amended order of protection that restrict the
 20 daily operations of the Phoenix VAMC given that Plaintiff and Defendant both share the
 21 Phoenix VAMC as a workplace. There is no dispute that the portion of the amended order
 22 of protection at issue restricts Defendant Kulbeth’s presence and conduct in the workplace,
 23 and, thus, the operations of the Phoenix VAMC where both Plaintiff Sweeney and
 24 Defendant Kulbeth work. The May 31, 2024, amended order of protection includes orders
 25 enjoining Defendant Kulbeth (1) from having contact with Plaintiff Sweeney at the
 26 Phoenix VAMC except through attorneys, legal process, and court hearings, and (2) from

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 28 ³ “A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).” 28 U.S.C. § 1447(c).

1 entering the Phoenix VAMC if Plaintiff is present (Doc. 1-4 at 8-9). As correctly explained
2 in the United States' Motion to Dismiss (Doc. 19 at 4-7), although the United States is not
3 a named party, the United States is a party to this action. The United States is a party to
4 this action because the amended order of protection restraining Defendant Kulbeth's
5 presence and conduct at the Phoenix VAMC restrains the Department of Veterans Affairs
6 from acting and/or otherwise compels it to act and is therefore a suit against the United
7 States.

8 Importantly, the doctrine of derivative jurisdiction applies to cases removed
9 pursuant to § 1442(a). *See In re Elko Cty. Grand Jury v. Siminoe*, 109 F.3d 554, 555 (9th
10 Cir. 1997); *Fed. Bureau of Investigation*, 507 F. Supp. 2d at 1092. According to this
11 doctrine, "a federal court [is] without jurisdiction over a suit removed to it from state court
12 if the state court from which it was removed lacked subject matter jurisdiction, even though
13 the federal court would have had jurisdiction had the suit been brought there originally."
14 *Beeman v. Olson*, 828 F.2d 620, 621 (9th Cir. 1987); *see also Elko Cty.*, 109 F.3d at 555.
15 "Thus, if the state court lacks jurisdiction over a given matter, the case is a nullity when
16 filed and a fortiori, the district court acquired no subject matter jurisdiction over those
17 claims upon removal." *Fed. Bureau of Investigation*, 507 F. Supp. 2d at 1090 (internal
18 quotation marks omitted). Because this Court's jurisdiction is wholly derived from that of
19 the Superior Court, it must quash the amended order of protection unless the Superior Court
20 was authorized to issue the amended order of protection. *See Id.* at 1092.

21 The Maricopa County Superior Court lacked jurisdiction to impose terms in the
22 amended order of protection restricting Defendant Kulbeth's presence and conduct
23 (including communications, statements, and activities) in the workplace, and, thus, the
24 operations of the Phoenix VAMC due to federal sovereign immunity. Similarly,
25 enforcement of such amended order of protection terms by Superior Court violates the
26 Supremacy Clause. All provisions of the amended order of protection that restrict conduct
27 or presence of Defendant Kulbeth at the Phoenix VAMC and all provisions of the amended
28 order of protection that restrict the daily operations of the Phoenix VAMC violate federal

1 sovereign immunity; any enforcement of such provisions by the Superior Court violates
 2 the Supremacy Clause. As recently explained by a District Court in the Northern District
 3 of California:

4 Numerous courts have found requests for civil restraining orders against
 5 federal employees to be barred by sovereign immunity when the employees
 6 are acting in the scope of their employment and the restraining orders would
 7 restrict their activities in the workplace. *See Guancione v. Espinoza*, Case
 8 No. 23-cv-01935-BLF, 2023 WL 4551073, at *4-5 (N.D. Cal. July 14, 2023)
 9 (holding sovereign immunity barred suit and dissolving stay away order
 10 against federal marshal where marshal was executing court-ordered real
 11 estate foreclosure and judicial sale of property); *Kline v. Johns*, No. 21-cv-
 12 03924-KAW, 2021 WL 3555734, at *2 (N.D. Cal. Aug. 2, 2021) (dismissing
 13 case based on sovereign immunity and dissolving civil harassment
 14 restraining order against federal employee where the plaintiff claimed
 15 harassment in the workplace because the “TRO interferes with Defendant's
 16 ability to perform his job as a federal employee”), appeal dismissed, No. 21-
 17 16316, 2021 WL 7442177 (9th Cir. Dec. 7, 2021); *see also Sherill v. Van*
 18 *Cleave*, No. CV-22-01274-PHX-DGC, 2022 WL 14644390, at *4-5 (D. Ariz.
 19 Oct. 25, 2022) (“To the extent the injunction restrains Van Cleave from
 20 having contact with Sherrill at the federal workplace and going to the
 21 workplace, the Court agrees with the United States that the injunction is
 22 barred by sovereign immunity.”); *Clark v. United States*, Case No. C21-507
 23 MJP, 2021 WL 3129623, at *2 (W.D. Wash. July 23, 2021) (where parties
 24 were co-workers at federal agency, dismissing case based on sovereign
 25 immunity because “[t]he petition does not identify any provision of law by
 26 which the United States has waived sovereign immunity for the purpose of
 27 permitting its employees, acting in the scope of their employment, to be sued
 28 such that a state-court order of protection could be issued against them and
 restrict their activities at the workplace”); *Figueroa v. Baca*, Case No. ED
 CV 17-1471 PA (AGRx), 2018 WL 2041383, at *3 (C.D. Cal. Apr. 30, 2018)
 (where parties were civilian employees at Fort Irwin Army Garrison,
 dissolving portion of a TRO that applied to workplace and remanding
 remainder of case to state court). The Court agrees with the reasoning of these
 courts, and finds that [Plaintiff]’s requests for civil restraining orders are
 barred by sovereign immunity.

Coelho v. Chalas, No. 23-CV-04525-SI, 2024 WL 150586, at *3 (N.D. Cal. Jan. 12, 2024).
 The United States is correct that in Plaintiff Sweeney’s response, Plaintiff Sweeney “cites
 nothing that would serve as a waiver of the United States’ sovereign immunity, but rather
 argues that the Court should compel the United States to waive its sovereign immunity on

1 equitable grounds—something the Court simply cannot do” (Doc. 24 at 2). Thus, the Court
 2 will vacate the May 31, 2024, amended order of protection in Maricopa County Superior
 3 Court case number FN2024-050866 insofar as the terms of the amended order of protection
 4 restrain Defendant Kulbeth’s presence, conduct, and/or communications at the Phoenix
 5 VAMC.

6 In addition to the terms violative of sovereign immunity, enforcement of which are
 7 violative of the Supremacy Clause, the amended order of protection also contains conduct
 8 and stay-away provisions that apply entirely outside of the federal workplace (Doc. 1-4 at
 9 8-9; *see also* Doc. 1-4 at 2-5). To the extent that the amended order of protection contains
 10 provisions applying entirely outside the Phoenix VAMC, such provisions could not
 11 reasonably be construed to apply against Defendant Kulbeth in her capacity as a federal
 12 employee and do not restrict the daily operations of the Phoenix VAMC. Thus, such
 13 provisions do not implicate sovereign immunity or the Supremacy Clause. To the extent
 14 that provisions of the May 31, 2024, amended order of protection at issue do not restrict
 15 Defendant Kulbeth’s presence, conduct, and/or communications at the Phoenix VAMC,
 16 the Court will remand the amended order of protection to the Maricopa County Superior
 17 Court.

18 Accordingly,

19 **IT IS HEREBY ORDERED** granting the United States’ Motion to Dismiss (Doc.
 20 19) and Defendant Kulbeth’s joinder in the motion to dismiss (Doc. 21) as stated herein.

21 **IT IS FURTHER ORDERED** vacating the amended order of protection issued on
 22 May 31, 2024, in Maricopa County Superior Court case number FN2024-050866 insofar
 23 as the terms of the amended order of protection restrain Defendant Kulbeth’s presence,
 24 conduct, and/or communications at the Phoenix VA Medical Center (also referred to herein
 25 as the “Phoenix VAMC”).

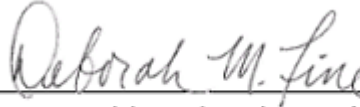
26 **IT IS FURTHER ORDERED** vacating the amended order of protection issued on
 27 May 31, 2024, in Maricopa County Superior Court case number FN2024-050866 enjoining
 28 Defendant Kulbeth (1) from having contact with Plaintiff Sweeney at the Phoenix VA

1 Medical Center (also referred to herein as the “Phoenix VAMC”) except through attorneys,
2 legal process, and court hearings, and (2) from entering the Phoenix VA Medical Center
3 (also referred to herein as the “Phoenix VAMC”) if Plaintiff is present (Doc. 1-4 at 8-9).

4 **IT IS FURTHER ORDERED** directing the Clerk of this Court to remand without
5 delay the remainder of the Maricopa County Superior Court’s May 31, 2024, amended
6 order of protection in case number FN2024-050866 back to the Maricopa County Superior
7 Court.

8 **IT IS FURTHER ORDERED** directing the Clerk of this Court to terminate this
9 matter.

10 Dated this 27th day of September, 2024.

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12 _____
13 Honorable Deborah M. Fine
14 United States Magistrate Judge
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